Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5187

PHILLIP JEROME LEE,
Petitioner,

—*v.*—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 9, 1976
CERTIORARI GRANTED JANUARY 10, 1977

Supreme Court of the United States

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

Criminal Docket—FCR 74-3

THE UNITED STATES

v.

PHILLIP JEROME LEE

DOCKET ENTRIES

DATE	PROCEEDINGS
2-6-74	1. U.S. Atty. files information, pls
2-6-74	2. U.S. Aty files petition for writ of habeas corpus ad prosequendum
2-6-74	3. Writ of Habeas corpus ad prosequendum entered by the court. Copies handed to U.S. Marshal, Fort Wayne and to U.S. Atty. pls
2-7-74	4. Def. Phillip Jerome Lee in court without counsel. Court to appoint an attorney. mb
2-8-74	4a. Fergus Kear appointed counsel. CJA to A.O. pls
2-18-74	5. Official Court Reporter files record of proceedings for the date Feb. 7, 1974. mb
2-13-74	6. Writ of Habeas Corpus Ad Prosequendum returned executed 2-6-74. mb
3-4-74	7. Petition for writ of habeas corpus ad prosequendum filed. mb

DATE	PROCEEDINGS

2-4-74 8. Writ of habeas corpus ad prosequendum entered. (SE) Eschbach. 2 copies to Marshal, copy to U. S. Attorney 3-4-74. mb

3-12-74 9. (ARRAIGNMENT) Def. appearing for arraignment in person and with counsel Fergus Kear. Gvt. present by John Wilks, U.S. Atty. Def. arraigned and pleads not guilty. R. Grant, Judge. pls

3-15-74 10. Writ of habeas corpus ad prosequendum returned executed 3-12-74.

3-26-74 11. Official Court Reporter files record of proceedings for the date March 12, 1974. mb

5-23-74 12. Fergus M. Kear files Motion for Leave to Withdraw. Cert. of Serv. slm

5-24-74 13. Pursuant to motion filed 5-23-74, motion granted and court-appoints counsel, Fergus Kear, is now withdrawn. This court now appoints Donald C. Swanson, Esq. as counsel for def. Clerk of this court is directed to enter an order on CJA Form 20 appointing Mr. Swanson. This cause is now set for jury trial on Tuesday, July 16, 1974, at 9:30 a.m. U.S. Atty. is directed to submit to this court a writ of habeas corpus ad prosequendum returning def. to Allen County Jail no later than July 3, 1974. (SE) Eschbach, Judge. Copy to John R. Wilks, U.S. Atty., Fergus Kear, Donald C. Swanson and to Def. Phillip Jerome Lee 5-24-74. slm

5-24-74 14. Trial notice mailed to John R. Wilks, U.S. Atty. and Donald C. Swanson, slm

5-24-73 15. CJA Form 20 appointing Don Swanson attorney for defendant forward to A.O. pls

6-13-74 16. CJA Form 20 for attorney Fergus Kear approved in amount of $106.00 and forwarded to A.O. pls

6-25-74 17. U.S. files petition for writ of habeas corpus ad prosequendum. mb

DATE	PROCEEDINGS

6-25-74 18. Writ of habeas corpus ad prosequendum entered. (SE) Eschbach. Copies to U.S. Marshal and U. S. Attorney, J. Wilks 6-25-74. slm

7-12-74 19. Defendant files waiver of right to trial by jury. mb

7-12-74 20. Indigent defendant's motion for costs of service of supoenas and witness fees filed. mb

7-12-74 21. Consent to court trial filed. Cert. of serv. mb

7-15-74 22. Order entered. (SE) Eschbach. Trial of the captioned matter will now be to the court without a jury pursuant to Waiver and consent filed. Copy to U. S. Attorney, John Wilks and Donald C. Swanson 7-15-74. mb

7-15-74 23. Order entered. (SE) Eschbach. Pursuant to indigent defendant's motion, court orders the U.S. to provide monies necessary for cost of service of subpoena and witness fees. Copy to U.S. Marshal, U.S. Attorney and Donald Swanson 7-15-74. mb

7-16-74 24. 9:30 a.m. Cause for trial to the court. Gvt. by Frank Gray, AUSA. Defendant in person and with counsel Donald Swanson, Jr. Government presents opening statements. Defense motion to dismiss information and argument presented. Motion denied at this time but will be taken under advisement. Defense presents opening statements. Government presents evidence, concludes and rests. Defense presents motion for judgment of acquittal. Motion denied. Defense presents no evidence. Both sides rest. Court dismisses this cause of action because the information is improperly drafted. Eschbach, Judge. pls

8-1-74 25. Official Court reporter files record of proceedings for the date July 16, 1974. mb

8-1-74 26. CJA Form 20 approved in amount of 400.00 and forwarded to A.O. pls

7-30-74 Writ of habeas corpus ad prosequendum returned fully executed. mb

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

FCR 74-3

[Filed Feb. 6, 1974]

UNITED STATES OF AMERICA

v.

PHILLIP JEROME LEE

Title 18, Section 13, U.S.C.
& Section 10-3030 Burns Indiana
Statutes

The United States Attorney charges:

On or about the 21st day of December, 1973, at the United States Post Office, Fort Wayne, Indiana, in the Northern District of Indiana, on land acquired for the use of the United States and under the exclusive jurisdiction thereof, PHILLIP JEROME LEE did take and steal two billfolds containing $66.00 from Charles Bilskie in violation of Title 18, Section 13, United States Code and Section 10-3030 Burns Indiana Statutes.

/s/ John R. Wilks
JOHN R. WILKS
United States Attorney

BURNS INDIANA STATUTES—Section 10-3030

II. THEFT

— IC 35-17-5-3 —

10-3030. Theft in general.—A person commits theft when he (1) knowingly:

(a) obtains or exerts unauthorized control over property of the owner; or

(b) obtains by deception control over property of the owner or a signature to any written instrument; or

(c) alters, replaces, transfers or substitutes without authorization of the owner any label, price tag or price marking upon any property or merchandise displayed or offered for sale by any mercantile establishment, as defined by IC 1971 35-3-2-4(c) [subsection (c) of § 10-3045]; or

(d) transfers without authorization of the owner any property or merchandise displayed or offered for sale by any mercantile establishment, as defined by IC 1971, 35-3-2-4(c) [subsection (c) of § 10-3045] from the package, bag or container in or on which such product or merchandise is displayed, to any other package, bag, or container; or

(e) obtains by threat control over property of the owner or a signature to any written instrument; or

(f) obtains control over stolen property knowing the property to have been stolen by another, which knowledge may be inferred from the possession of such stolen property, wherever the theft may have occurred; or

(g) brings into this state property over which he has obtained control by theft, wherever the theft may have occurred; and

(2) either:

(a) intends to deprive the owner of the use or benefit of the property; or

(b) intends to deprive the owner of some part or all of the value, which value and ownership shall be inferred from the price tag or price marking on such merchandise or property, of any property or merchandise

displayed or offered for sale by any mercantile establishment as defined by IC 1971, 35-3-2-4(c) [subsection (c) of § 10-3045]; or

(c) uses, conceals or abandons the property in such manner as knowingly to deprive the owner of such use or benefit; or

(d) uses, conceals or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of such use or benefit. [Acts 1963 (Spec. Sess.), ch. 10, § 3, p. 10; 1971, P. L. 458, § 1, p. 2096.]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

[Title Omitted in Printing]

EXCERPTS FROM TRIAL TRANSCRIPT—July 16, 1974

* * * *

[2] PROCEEDINGS

(Court opened at 9:30 a.m.)

THE COURT: Good morning, Gentlemen.

MR. GRAY: Good morning, Your Honor.

THE COURT: Gentlemen, this is the bench trial in FCR 74-3, United States of America against Phillip Jerome Lee. Is the Government ready for trial?

MR. GRAY: Yes, Your Honor.

THE COURT: Does either side wish an opening statement?

MR. GRAY: I would like to make a brief comment, Your Honor.

THE COURT: Very well.

MR. GRAY: Your Honor, the Information that is before the Court today involves the violation of Federal land of a state statute involving the general theft statute of the laws of the State of Indiana, and the Government maintains that the proof to be submitted will substantiate the charges that have been filed in this matter, in that the taking of wallets from Charles Bilskie, the blind vendor, by the Defendant obtained unauthorized control over his property, and also that the stealing would be shown by the evidence that he intended to deprive Mr. Bilskie of the use of the property.

The charge, as indicated in the Information filed, [3] will show that $66 which was contained in the two wallets owned by Mr. Bilskie was taken by Mr. Lee, and that Mr. Lee was apprehended in the course of attempting to escape once he had taken these bill folds from Mr. Bilskie.

THE COURT: Mr. Swanson, do you wish an opening statement, sir?

MR. SWANSON: Your Honor, before I make a brief opening statement, I realize this is probably a little bit out of order, but I think it should be considered by the Court at this time.

I would like to make a motion to dismiss this Information. I was in this case after the time had passed for such a motion to be made, and I think that the Court should consider what I have to say in the interest of justice.

THE COURT: Well, I will consider it, but you certainly were in the case before this morning. It is difficult to deal with a motion to dismiss if you raise any technical questions, and you don't give me the opportunity in advance of trial to research them. So I will hear you, but you have that problem.

MR. SWANSON: Okay, Your Honor. I would like to respectfully point out to the Court that the Federal statute involved points the Court back to the state law of theft, Burns, Section 10-3030. Burns, Section 10-3030, [4] has two sections. One is seven elements for an offense and the second one four elements or offenses. Now in the Information there is no indication as to which specific offense he is charged with.

Secondly and in conjunction with that first point, the sum of 11 offenses or charges deprives my client of due process and doesn't give him proper notice as to what charges to defend against.

THE COURT: You mean that the statement in the Information that Phillip Jerome Lee did take and steal two bill folds containing $66 from Charles Bilskie, is not a specific enough charge to know what you are defending against?

MR. SWANSON: What I am saying in the Information, sir, that Burns Section 10-3030 with which he is charged, there is no specific section in the Information.

THE COURT: I know, but there is specific language. I think you are referring to the fact that the particular

subsection of sub-paragraph of 3030 is not cited, is that your reference?

MR. SWANSON: Yes.

THE COURT: Well, I think that certainly would be taken care of by the specificity of the Information itself.

MR. SWANSON: Okay. My second point now in my motion to dismiss the Information is that the Information fails to [5] recite that the alleged offense was committed knowingly. In Burns Section 10-3030 that is an essential element of the crime that it was done knowingly. Both sections refer to a knowing and specific intent crime, and there is law, Your Honor, that states that if the Information of Indictment under this section and specific intent is not set out in the Information, then the Information must be dismissed. That law case cited is Miller versus State, 250 Indiana 338, 236 NE2d 173.

THE COURT: Anything further?

MR. SWANSON: Yes, there is one further point. The Information also fails to state that my client intended to deprive the owner permanently of the articles alleged to be stolen.

THE COURT: Well, since I have had no opportunity to study this at all, I will deny the motion at this time, but at my first opportunity I will check your citation and give consideration as appears to be warranted.

Is there anything further by way of opening statement?

MR. SWANSON: Yes, Your Honor, I would like to make a few remarks at this time.

THE COURT: Very well.

MR. SWANSON: It is our position, of course, that Phillip Lee, charges with this offense, denies his guilt. [6] We believe the evidence will show that there were two people on the day in question, himself and one Bruce Anderson. It will be our position, and I believe the evidence will bear us out, that if something was stolen on this date that Bruce Anderson was in fact the culprit in the matter.

That is about all I have to say in opening statement, Your Honor.

THE COURT: All right, Mr. Gray, you may proceed with the Government's case.

MR. GRAY: Thank you, Your Honor. Prior to introducing the first witness, the parties to have a stipulation.

THE COURT: You have a stipulation?

MR. GRAY: Yes, Your Honor. It is my understanding after talking with Counsel for the Defendant the element of the Information relating to the fact that this act, if any act took place, in the United States Post Office, Fort Wayne, Indiana, Northern District of Indiana, did in fact take place on land acquired for the use of the United States, and under the jurisdiction thereof.

THE COURT: Is that so stipulated, Mr. Swanson?

MR. SWANSON: Yes, Your Honor, that is correct.

THE COURT: That means the exclusive use, which was exclusive use as of the date alleged in the Information, that would be December 21, 1973; is that correct, Gentlemen?

[7] MR. SWANSON: Yes, sir.

MR. GRAY: That is right.

THE COURT: All right, you may proceed.

MR. GRAY: Your Honor, the Government would call as its first witness Mr. Vance Travis.

Whereupon,

VANCE W. TRAVIS,

was called as a witness by and on behalf of the Government, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Gray:

Q. State your name to the Court?

A. Vance W. Travis.

Q. Would you speak up just a little bit, Mr. Travis, so Mr. Swanson can hear you? What is your age?

A. 53.

Q. And what is your occupation?

A. I am a security police officer with the United States Postal Service.

Q. What are your duties in your position?

A. Well, our duties consist of court room protection and plant protection within the building and without.

Q. By building, which building are you referring to?

A. The United States Court House and Post Office

* * * *

[64] THE COURT: Very well. The recess is granted and we will take a fifteen minute recess. How many witnesses will you have, do you know, Mr. Swanson?

MR. SWANSON: We have subpoenaed one, Your Honor.

THE COURT: All right.

(A recess was taken.)

THE COURT: You may proceed, Mr. Swanson.

MR. SWANSON: Your Honor, at this time I would like to make a defense motion for judgment of acquittal. We feel that the prosecution has failed to set out a prima facie case of theft under Burns Annotated Statutes, Section 10-3030, in that the prosecution has failed to establish the requisite intent, the intent to deprive the owner permanently of the articles allegedly stolen; and, two, that the prosecution has failed to establish that possession of the billfolds were ever in the Defendant. They talked around the subject but it has never been affirmatively set out that they were in the possession of the Defendant. I know there was testimony by the officer that he saw an object in the Defendants hand—

THE COURT: He didn't say object. He said he saw the wallets in the Defendant's hand, Mr. Swanson. I invite your attention to the record, but let's stay with it Are you talking now about the Government's proof or are you talking about the Government's charge? If you are talking [65] about the proof—

MR. SWANSON: I thought Your Honor had overruled my motion.

THE COURT: I said I had to defer it at that time until I could do some research on it, your original motion to dismiss, because you made it when I came on the bench to start the trial; is that not a correct statement of the record?

MR. SWANSON: Yes, sir.

THE COURT: And I reserved the right to do some research. Now we are talking about your motion as your motion is addressed to the proof.

MR. SWANSON: Yes, Your Honor.

THE COURT: You made the statement that there was a vague reference to something in the Defendant's hand. My recollection of Officer Travis' testimony was that he saw the billfolds in the Defendant's hand. I think that is sufficient possession, unless you are saying that he didn't hold them in his hand long enough.

MR. SWANSON: What I am saying, Your Honor, is that the officer testified, and I stand corrected, that he saw the wallet in the hand of the Defendant and he did not say two wallets, he said a wallet in the hand of the Defendant.

THE COURT: And then he indicated how thick that was.

[66] MR. SWANSON: Yes, that is correct.

THE COURT: And he said about three inches, and as I recall Government's Exhibit 1, that just about measures out.

MR. SWANSON: That is correct, Your Honor. He also testified that he at no time took possession of the wallets. He saw them on the floor and indicated their where abouts to the owner, Mr. Billskie, but at no time did he take possession of the wallets, that the only time he saw these particular wallets was today.

THE COURT: Oh, I don't believe that is a correct statement of the record, either.

MR. SWANSON: Okay.

THE COURT: He said he didn't take possession but he had seen those wallets at other times when Mr. Billskie was closing his place of business checking out, I think were his words.

MR. SWANSON: That is correct. Okay. Well, my point is that the wallets, we do not feel that the Defendant has been shown to have been in possession of the wallets. So that is about all I can say.

THE COURT: Well, I think the evidence, and we are dealing now with what the evidence is, I think the evidence is clear that they were in the possession of the defendant and has been established certainly in a sufficient [67] degree to withstand a motion which now, as I understand it, is directed to the Government's proof?

MR. SWANSON: Yes, Your Honor.

THE COURT: You may proceed with the defense.

MR. SWANSON: Your Honor, we had subpoenaed one witness today. However, in conversations with my client, both myself and my client feel that this witness is a non-material witness and hence we rest our case.

THE COURT: Defense rests.

Now, Mr. Swanson, we will come back to your motions. Your motion addressed to the Government's proof borders on being frivolous. Your client has been proven beyond any reasonable doubt in the world, there is no question about his guilt; none whatsoever.

The great grevious part to me is that I must dismiss this case because the Information was improperly drawn. Whoever drew it up didn't even look at the Indiana Statute, but my responsibility under my oath, regardless of how I might condemn this man's conduct, and I do, sir, not your, your clients, I have to dismiss.

The briefest examination of the statute establishes that knowingly is an offense. Also under most of the sections which do not use knowingly there is an element that requires either intent to deprive the owner permanently of use and benefit of the property, or using such property in such a [68] manner as knowingly deprives the owner. No such allegation is contained, no matter how I stretch my imagination when I read the Information. There is nothing in there that even smacks of an element of intent.

So next I come to the question of, this is a Federal case, is the law any different in the Federal Court and where we are applying a state statute, which was the

situation here. The Federal law cases are legion that the sufficiency of the charges is dependent upon its containing the allegations of all of the elements, and all of the elements here are established by the state statute.

As much as I dislike doing so, I have no alternative but to grant your original motion of dismissal and the charge is dismissed.

Mr. Gray, I am not condemning you, I don't know who drafted it, but I can tell you if a law clerk of mine out of law school drafted something like that, I would send him back for a refresher course. You may carry that complete message back to your department.

Court is in recess.

(Court recessed at 11:24 a.m.)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

[Title Omitted in Printing]

EXCERPTS FROM TRIAL TRANSCRIPT—June 23, 1975

* * * *

[88] I will submit to the Court that every element referred to in the Indictment has been proven, and that the defendant has been proven guilty beyond a reasonable doubt both of the violation of Title 18 Section 13 of the Code and the general theft statute of the Burn's Code Section 10-3030.

THE COURT: Mr. Meessen?

MR. MEESSEN: Your Honor, I have nothing further at this time.

THE COURT: At the outset I conclude and stress the wish that all of the decisions that I have to make were as clear to the Court as this one. There is [89] no doubt in the Court's mind beyond any reasonable doubt that this defendant is guilty, and the Court so finds that he is guilty.

All of the elements of the offense are there. I imagine that if the information that is presented here—which I gather from the way the prosecutor followed the transcript was probably about the same as it was in the other trial—thus it came as no surprise to this defendant.

By the way; is that true, Mr. Gray?

MR. GRAY: I'm sorry, Your Honor. Were you discussing the transcripts from the first case?

THE COURT: Yes. That is, did the evidence generally follow what was presented before?

MR. GRAY: Yes.

THE COURT: I gather that if the evidence that was presented here and a repeat of what was done before was not the way it happened, that this defendant's sister might have been here to testify to the contrary. At least, there is no [90] showing that she was unavailable or couldn't come. There's no reason at all why this

Court should not find that, and we do now find, beyond any doubt, that this defendant is guilty as charged in this Indictment.

We will set this matter for the 30th of July at 11:00 a.m. for final sentencing.

What is the bond arrangement under which this defendant is at liberty?

MR. GRAY: Your Honor, I believe this defendant is at liberty under a $1,000 OR Bond, which, I believe, was made by the magistrate in December of 1974. I do not know whether the defendant has posted any bond. I believe he is out on his own recognizance.

* * * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-1836

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

PHILLIP JEROME LEE, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

No. F-Cr-74-83

ROBERT A. GRANT, *Judge*

ARGUED JANUARY 21, 1976—DECIDED JULY 21, 1976

Before SWYGERT and BAUER, *Circuit Judges*, and HOFFMAN, *Senior District Judge*.[1]

PER CURIAM. The question presented on this appeal is whether the double jeopardy clause of the Constitution is violated when a person is put to trial twice, the first time on a faulty charge.

The evidence at both trials was identical. Charles Bilskie, a blind person, operated a newspaper and candy concession in the main lobby of the Fort Wayne, Indiana, Post Office. On December 21, 1973 Bilskie had placed

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[1] The Honorable Julius J. Hoffman, United States Senior District Judge for the Northern District of Illinois, sitting by designation.

his two wallets containing money in the amount of $66.00 on the counter behind his stand. A postal security officer, Vance Travis, was in the lobby during the day and saw two people talking to Bilskie. One of these was later identified as defendant-appellant Phillip Jerome Lee. Officer Travis saw Lee go behind the counter and after noticing that Lee had Bilskie's wallets in his hand, shouted, "Stop." Lee attempted to escape, but was apprehended by Travis.

The defendant was charged by an information with violating 18 U.S.C. § 13 [2] and I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971),[3] (theft while on property under the jurisdiction of the federal government). At his trial, but before any evidence was introduced, the defendant moved that the information be dismissed because it did not include the allegation that the offense was "knowingly" committed. The trial judge took the motion under advisement and proceeded to hear the evidence. At the conclusion of the trial the objection to the faulty information was sustained and the case was dismissed.

The defendant was thereafter indicted for the same offense with the correction that the theft knowingly occurred. After a bench trial, the defendant was found guilty and given a prison sentence.

The sole issue on appeal is whether a retrial of the defendant for the same offense pursuant to a corrected indictment violated his right against double jeopardy.

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[2] 18 U.S.C. § 13 reads:

> Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in section 7 of this title, is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

[3] I.C. 35-17-5-3, Burns Ind. Stat. § 3030 (1971), reads:

> Theft in general.—A person commits theft when he (1) knowingly: (a) obtains or exerts unauthorized control over property of the owner; . . .

Recently, in *Serfass* v. *United States*, 420 U.S. 377, 388 (1975), the Supreme Court discussed at what point in a criminal proceeding the double jeopardy clause becomes applicable:

> As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of "attachment of jeopardy." In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a nonjury trial, jeopardy attaches when the court begins to hear evidence. The Court has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is "put to trial before the trier of the facts, whether the trier be a jury or a judge." (Citations omitted.)

The question, however, of when double jeopardy attaches should not be determined mechanically, as the Court pointed out in *Illinois* v. *Somerville*, 410 U.S. 458 (1973). Rather the question must turn on the particular facts presented by each case. For examle, in *Somerville*, the defendant had been indicted for the crime of theft. The case was called for trial and a jury was impaneled and sworn, but before any evidence had been presented the prosecuting attorney brought to the trial court's attention the fact that the indictment was fatally defective. Because the defect was "jurisdictional" under the prevailing state law and could not be waived, the trial judge granted the state's motion for a mistrial. The defendant was reindicted (under proper allegations) for the same offense and a jury returned a verdict of guilty. The Supreme Court held that the double jeopardy clause did not bar the defendant's retrial.

In *United States* v. *Valazquez*, 490 F.2d 29 (2d Cir. 1973), the trial judge dismissed an indictment after he had examined defendant's pretrial motion papers containing allegations of facts going to the issue of guilt or

innocence. The allegations were disputed by the Government. It appealed under 18 U.S.C. § 3731, and the defendant pleaded double jeopardy. The Second Circuit allowed the appeal and held that double jeopardy had not been invoked even though the trial court had gone beyond the allegations of the indictment and had considered evidentiary facts, though not, as the court emphasized, in an adversary trial setting.

In the case at bar, the motion of dismissal was made by the defendant on the day of trial. The dismissal was granted after the evidence was heard, but before any finding was made of guilt or innocence. It was not based on evidence adduced at trial, but rather on the failure of the information to state an essential element of the offense—in short, because of a jurisdictional defect. Significantly, the defendant knowing that the court had taken his motion to dismiss under advisement did not object to going forward with the trial. Under these circumstances, we conclude that the double jeopardy clause did not bar his retrial.

Double jeopardy does not attach when a defendant secures a reversal of his conviction because of a faulty indictment and after remand he is tried on a new indictment for the same offense. *United States* v. *Ball*, 163 U.S. 662 (1896). There is a certain analogy between this case and the one before us. Had Lee's motion to dismiss been denied and had he been found guilty, his appeal would likely have resulted in a reversal and a remand for retrial. Under *United States* v. *Ball*, *supra*, a new trial would not constitute double jeopardy.

For these reasons, the conviction is affirmed.

SUPREME COURT OF THE UNITED STATES

No. 76-5187

PHILLIP JEROME LEE, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Seventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

January 10, 1977

☆ U. S. GOVERNMENT PRINTING OFFICE: 1977 229099 62